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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/522,721

03/11/2005

Clifford L. Jordan

P56713US

8538

8439 7590 02/22/2010
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EXAMINER

MATTER, KRISTEN CLARETTE

ART UNIT

PAPER NUMBER

3771

NOTIFICATION DATE

DELIVERY MODE

02/22/2010

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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<p align="center">Advisory Action Before the Filing of an Appeal Brief</p>	<p>Application No. 10/522,721</p>	<p>Applicant(s) JORDAN, CLIFFORD L.</p>	
	<p>Examiner KRISTEN C. MATTER</p>	<p>Art Unit 3771</p>	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 26 January 2010 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: 76.
Claim(s) objected to: _____.
Claim(s) rejected: 54-64 and 71-75.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Justine R Yu/
Supervisory Patent Examiner, Art Unit 3771

/Kristen C. Matter/
Examiner, Art Unit 3771

Continuation of 11. does NOT place the application in condition for allowance because: The bulk of applicant's arguments are addressed in the final rejection of 10/26/2009 and responses to those arguments will not be repeated here. In addition, examiner notes that the amended specification of 10/2/09 is enough to give the instant application priority to parent case 10/208,188 (since the application number was mentioned in the original specification but the claim to priority was incorrect, unclear, and confusing -- i.e., the claim was for priority under USC §119). Examiner points out, however, that the correct priority claim appears to be for a continuation application not a divisional since the same invention is being claimed.

Examiner also again points out there is no record of an ADA filed in this case before the one filed 1/26/2010. However, as noted above, priority will be granted even though the 4 month time limit has lapsed since the application number was presented in the original specification even though the claim for priority was unclear. Applicant is encouraged to change the priority claim to a CON type instead of DIV.

Applicant's arguments regarding patent number 7,270,125 are confusing because that case/patent has nothing to do with the instant application. US 7,270,125 is a divisional of the parent case 10/208,188 and all claims are drawn to methods of testing and operating the gas system, which was correctly restricted out in the parent application and does not pose a double patenting issue with the instant application. The instant claims under dispute are directed to a gas testing system, same as claimed in the parent patent 6,820,616.

Examiner also reiterates that even if the restriction in parent case 10/208,188 was not withdrawn, as noted in the MPEP §804.01, when an identical invention is claimed in both the patent and a pending application (as is the case here with the apparatus claims), "the Office will make a double patenting rejection because a patentee is entitled to only a single patent for an invention." Here, the same device is being claimed in the patent and the instant application. The restriction requirement in the parent case was between an apparatus and a method of using that apparatus. The apparatus claims were elected, examined, and issued as a patent. Accordingly, only the method claimed in instant claim 76 is considered a separate and distinct invention from the patented apparatus.

Moreover, applicant's comments regarding MPEP section 803.01 actually support the examiner's position that public interest requires that two patents are not issued for the same invention. Thus, examiner disagrees that there is nothing in USC §121 authorizing the examiner to forbid the issuance of two patents for the same invention. Here, the US 6,820,616 patent and the instant application are both drawn to a gas system with the same structure. Accordingly, applicant is not entitled to two patents on that invention.